CHU CHEE PENG v. PUBLIC PROSECUTOR

[R.Cr.J. (Syed Othman J.) April 4, 1972]

[Johore Bahru — Criminal Revision No. 3 of 1971]

Criminal Law and Procedure — Summary trial — Discharge not amounting to acquittal — Whether same charges can be brought before another president — Autrefois acquit — Res judicata or issue estoppel — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(g), (j), (m) (1) and 254.

The petitioner, a registered medical practitioner, was charged before the sessions court with three offences under section 4(c) of the Prevention of Corruption Act, 1961. Each of the three charges alleged, in effect, that he, on the day and time specified, issued a bogus medical certificate to a government servant recommending him for medical sick leave. He claimed trial to the charges.

The learned president, proceeded to hear the case for the prosecution. Arguments ensued as to whether or not the medical certificate that had been produced was a document within the meaning of section 4(c) of the Prevention of Corruption Act, 1961. The learned president held that it was not such a document and ruled that the charges were groundless and made the following order for each charge: "discharged not amounting to an acquittal", by virtue of section 173(g) of the Criminal Procedure Code.

A few months later the prosecution brought the same charges against the petitioner in the same court but before another president. The succeeding president ruled that she could proceed to hear the case.

The petitioner sought the court to hold, in effect, that the decision of the succeeding president was invalid and that in view of the order of the preceding president, the succeeding president should not proceed to hear the case further on the same charges.

Held: (1) the power of the magistrate to discharge the accused under section 173(g) of the Code is at any stage before the prosecution opens its case and under section 254 on application by the prosecution at any stage of the trial before judgment;

(2) the preceding president did not conduct the trial in the manner required by section 173 of the Criminal Procedure Code. Thus, the order of the preceding president was bad because it was not made in accordance with law and at a stage of a trial contrary to the requirements of law. Therefore, the order was to be set aside and the trial before the succeeding president to be proceeded with.

Cases referred to:-

(1) *Connelly* v. *Director of Public Prosecutions* [1964] 2 All E.R. 401.

(2) *Public Prosecutor* v. *Lee Siew Ngock* [1966] 1 M.L.J. 229.

(3) *Public Prosecutor* v. *A. G. Kyle-Little & Anor.* [1971] 1 M.L.J. 125.

(4) *Public Prosecutor* v. *Perianan Chetty* 4 F.M.S.L.R. 30.

(5) *R.* v. *Dassan* [1940] M.L.J. 242.

(6) *Ahmad Shah bin Yassin* v. *Public Prosecutor* [1952] M.L.J. 28.

(7) *Public Prosecutor* v. *Leong Yoon Meow* (Ipoh Criminal Revision No. 17 of 1953 — Unreported).

(8) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(9) *Burgess* v. *Boetefeur* 13 L.J.M.C. 126.

REVISION.

Amarjit Singh for the petitioner.

Mohamed Adnan bin Dato' Shuib (Senior Federal Counsel) for the Public Prosecutor.

Syed Othman J.: The petitioner, a registered medical practitioner, was charged before the sessions court at Johore Bahru with three offences under section 4(c) of the Prevention of Corruption Act, 1961. Each of the three charges alleged in effect that he on the day and time specified issued a bogus medical certificate to a government servant recommending him for medical sick leave. He claimed trial to the charges.

The learned president proceeded to hear the case for the prosecution. He heard evidence from only two witnesses. The main evidence in respect of the first charge was given by a government servant. Briefly his evidence was as follows. At the request of a police inspector he went to the Federal Clinic at Johore Bahru and told a nurse that he wanted to report sick and wanted 2 days' leave. She asked him for $3 which he gave her. She then went to a room where, according to him, the doctor was, and came with a book of medical certificates which had already been signed. She wrote out the name of the government servant on a certificate and gave it to him. No one examined him. Nor was he asked to see the doctor for medical examination. He left the clinic and handed over the certificate to the police inspector who had been waiting for him some distance away. The certificate recommends the government servant for two days' medical sick leave. It bears a signature over the printed name of the petitioner.

As this witness was coming to the end of examination-in-chief, counsel for the defence, with a view according to him to save the time of the court, raised a preliminary objection. The deputy public prosecutor did not object and informed the court, what was obvious, "all these charges are the same".

Arguments then ensued as to whether or not the medical certificate that had been produced was a document within the meaning of section 4(c) of the Prevention of Corruption Act, 1961 (which I shall call corrupt document). After hearing the arguments, the learned president agreed with counsel for the defence that it was not, ruled that the charges were groundless, and made the order in respect of each charge "discharged not amounting to an acquittal", citing as authority section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6) (which I shall call paragraph (g)).

A few months later the prosecution brought the same charges against the petitioner in the same court but before another president. The president who first heard the case had been transferred elsewhere. The notes as to what transpired before the president this time are somewhat scanty but there appears to have been some arguments. Some authorities are recorded. The attention of the court appears to have been drawn to the ruling by the preceding president that the charges were groundless. The succeeding president however ruled that she would proceed to hear the case.

The petitioner now seeks this court to hold, in effect, that the decision of the succeeding president is invalid and that in view of the order of the preceding president, the succeeding president should not proceed to hear the case further on the same charges.

In view of the various principles of law involved in this case, I called for arguments.

In showing that the petitioner cannot be tried again on the same charges in the circumstances of the case counsel for the petitioner relies mainly on *Connel-*

ly v. *Director of Public Prosecutions*[1] where Lord Morris *inter alia* states: —

"Apart from circumstances under which there may be a plea of *autrefois acquit*, a man may be able to show that a matter has been decided by a court, competent to decide it, so that the principle of *res judicata* applies."

Counsel also refers to the principle of issue estoppel enunciated by the courts of other parts of the Commonwealth. The principles referred to by counsel were discussed at length by MacIntyre J., (as he then was), in *Public Prosecutor* v. *Lee Siew Ngock*.[2]

On behalf of the prosecution it is argued that as the order made by the preceding president was a discharge not amounting to an acquittal, it is open to the prosecution to bring the accused again for trial; and the order being a discharge not amounting to an acquittal would in effect be the same as one under section 254 of the Criminal Procedure Code. It is also contended that the preceding president was wrong in holding that the certificate was not a corrupt document as money had been paid for it.

In dealing with the application, since the petitioner has been brought again for trial by reason of the order made by the preceding president, I will have to examine the propriety of the trial conducted by the preceding president and the manner in which he invoked his powers under paragraph (g), and to consider whether the order is a proper one at law.

I think it would be premature for me to consider whether or not the medical certificates in the circumstances of the case are corrupt documents, in view of what transpired at the trial.

As to the principles of *res judicata* or issue estoppel, in cases where they apply the trials were concluded. In the present case the court did not even conclude recording evidence for the prosecution. Even in *Public Prosecutor* v. *A. G. Kyle-Little & Anor.*,[3] cited on behalf of the petitioner in the court below and here, and where it was held that a cement pipe was not a corrupt document, the trial was concluded.

I do not think that section 254 of the Criminal Procedure Code referred to by the prosecution is strictly relevant to the present case. Sub-section (ii) of that section, which applies to the subordinate courts, relates to a case where at any stage of a trial before the delivery of the judgment, the prosecution informs that court that it does not propose further to prosecute the accused upon the charge and with leave of the court the proceedings are stayed and the accused is discharged; whether the discharge shall amount to an acquittal is at the discretion of the court. In the case here, the prosecution did not apply for a stay of proceedings.

Mallal's Criminal Procedure, 4th Edn., cites two authorities under section 172(g) of the Singapore Criminal Procedure Code (Cap. 132, 1955 Edn.) which corresponds to paragraph (g). In *Public Prosecutor* v. *Perianan Chetty*[4] the Federated Malay States Court of Appeal held that it is the duty of a court to hear all the evidence that the prosecution desires to be heard; but if a judge acquits without hearing all the evidence and no objection is taken at the time the Court of Appeal will not interfere. In *R.* v. *Dassan*,[6] Terrell J.A. held that the *dictum* of the Court of Appeal in *Perianan's* case was *obiter* and as it was contrary to the express provisions of section 182(g) of the Criminal Procedure Code (S.S. Cap. 21) he did not feel bound to follow it.

With the utmost respect to Terrell J.A. from what appears in the reports the decision of the Court of Appeal, comprising the Chief Judicial Commissioner and one judicial commissioner, was not made under a provision in the F.M.S. Criminal Procedure Code similar to section 182(g) of the Straits Settlements Criminal Procedure Code (which is similar to Singapore Criminal Procedure Code (Cap. 132, 1955 Edn.), section 172(g)). Section 182(g) of the Straits Settlements Criminal Procedure Code and section 170 which was the equivalent provision of the F.M.S. Criminal Procedure Code at the time related to a summary trial before a magistrate. The old F.M.S. Criminal Procedure Code provided different procedures for trials before the senior magistrate without assessors (chapter XXI) and for trials before the judicial commissioners or senior magistrates with the aid of assessors (Chapter XXII). The decision of the Court of Appeal was in respect of a trial before a judicial commissioner. It is for this reason I would say that the decision cannot apply to a summary trial, though I would doubt if the High Court of nowadays would follow the procedure adopted by the judicial commissioner.

In *Perianan's* case the magistrate after hearing the complainant acquitted the accused without giving the prosecution the opportunity of calling their other witnesses in support of the charge. Terrell J.A. at pages 242/243 said: —

"It appears to me that some effect must be given to this sub-section, and I take it that a magistrate can avail himself thereof at any rate in the following cases:—

(a) where all the facts which the prosecution have set out to prove would not constitute a criminal offence even if they were accepted, or

(b) where an essential link in the prosecution case is provided by one or more witnesses whom the magistrate has heard and whose evidence he is not prepared to accept.

In either of these cases it is obvious that to hear further evidence would be a mere waste of time."

These principles have the effect that the court must hear all the necessary evidence the prosecution has to offer before exercising the power under the Straits Settlements provision. I am inclined to think that Terrell J.A. enunciated these principles because of the power to acquit. The power under paragraph (g) is to discharge.

In my view the power of the magistrate to discharge the accused under paragraph (g) can be determined purely on its construction and without recourse to abstract principles. Paragraph (g) must be read in conjunction with paragraph (f). The two paragraphs read: —

(f) If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.

(g) Nothing in paragraph (f) shall be deemed to prevent the court from discharging the accused at any previous

stage of the case if for reasons to be recorded by the court it considers the charge to be groundless.

Note the word in paragraph (g) is "discharging"; in the Straits Settlements section 182(g) and the then Singapore section 172(g) it is "acquitting".

Paragraph (g) says in effect that paragraph (f) does not prevent the magistrate from discharging the accused at "any previous stage of the case." This expression should not be confused with "any stage of any trial" which appears in section 254 of the Criminal Procedure Code. I have dealt with section 254 so far as it applies to the subordinate courts. "Any previous stage of the case" intended by paragraph (g) is, to my mind, in reference to the stage previous to the case in paragraph (f), which speaks of taking all evidence of the case for the prosecution. Therefore, the stage at which the court can consider whether or not the charge is groundless must be before the prosecution adduces its case. This is when the charge is framed or scrutinised by the court or before or after it is read and explained to the accused or even after the plea has been taken. But I do not think that it would be proper for the court to allow a charge to be read and explained or to record a plea and then to declare that the charge is bad, as this means that the court has failed in its duty of scrutinising the charge in the first instance. When scrutinising the charge if the magistrate finds any fatal error or objection in the charge it is his duty to point it out to the parties and to decide accordingly without waiting for the parties to produce the error or objection.

In *Ahmad Shah bin Yassin* v. *Public Prosecutor*[6] Taylor J. said at page 29: —

"On the general question, I would observe that while it is clearly the duty of those in charge of prosecutions, to guard against misjoinder and other errors in charges, it is also the duty of presidents and magistrates to examine all charges critically before calling on the accused to plead and to rectify errors at the earliest opportunity."

See also notes by *Mallal* on "Framing a Charge — Rules for Magistrates and Police Officers" ([1953] M.L.J. xxxv). Thomson J. (as he then was) said in *Public Prosecutor* v. *Leong Yoon Meow*[7] as follows: —

"As far as the magistrate is concerned, he should scrutinise every charge brought before him and compare it with the wording of the section under which it is brought. If it does not set out all the ingredients of the alleged offence as described in the section he should refuse to proceed further with it, and if it cannot be amended so as to bring it in accordance with the section it should be dismissed."

Ordinarily any challenge to the charge should be made before it is read and explained to the accused. If correctness of the charge can only be determined after hearing evidence, then the court must hear all the evidence the prosecution has to offer. The court has no power to cut short the prosecution while it is presenting its case, after all the court itself has already decided to hear the evidence. I should think that when an accused is on a charge, which on the face of it appears to coincide with the law creating the offence, it would be in the interest of the defence to raise any point of law affecting the charge only at the close of the case for the prosecution. The defence would then have the further advantage of criticising the whole of the prosecution's case and the court the benefit of deciding both on facts and law.

Briefly the power of the magistrate to discharge the accused under paragraph (g) is at any stage before the prosecution opens its case and under section 254 on application by the prosecution at any stage of the trial before judgment.

In the case here the defence did not say anything about the charges until after the plea, when counsel, according to the notes, said that the charges were bad; the court then directed the prosecution to lead evidence. There is a further note which reads "Counsel will raise objection after the medical certificates are tendered." When the court directed the prosecution to lead evidence it must be taken that the question as to whether or not the medical certificates were corrupt documents would and should have been a matter of evidence. It was out of order for the court to have allowed counsel to raise the objection while the prosecution was adducing evidence. The stage of challenging the charges had already passed. I do not think any issue can be made of the fact that the prosecution did not object to the defence "objection". The conduct of a trial is a matter for the court, and not a matter for the parties or for counsel making suggestions or raising objections or no objections.

In *Kuppusamy* v. *Public Prosecutor*,[8] the complainant was not ready with her evidence; the magistrate refused the application for adjournment; and he made an order that the defendants be discharged "without amounting to acquittal". On appeal it was argued that the order was *ultra vires* and the appellant should have been acquitted. Murray-Aynsley J. (as he then was) dismissing the appeal, said: —

"I think it is clear that the earliest stage at which a Magistrate can acquit an accused person is after hearing all the evidence for the prosecution.

Therefore the magistrate could not have acquitted in the present case, nor could he have awarded a discharge which amounted to an acquittal."

It will be observed that in this case the order was made before the stage of recording evidence.

I have already indicated that the power under the corresponding Straits Settlements provision is to acquit. An acquittal must be distinguished from a discharge in the context of paragraph (g). Tindal C.J. in *Burgess* v. *Boetefeur*,[9] said:

"The word acquired is *verbum equivocum* and may in ordinary language be used to express either the verdict of a jury, or the formal judgment of the court, that the prisoner go thereof without day".

And it should be obvious that the verdict or judgment can only be reached after hearing all the evidence. Hence under our procedure of a summary trial, an acquittal operates when the court finds that the prosecution has made out no case against the accused — section 173(f); or after considering both the cases for the prosecution and the defence finds that the accused is not guilty — section 173(m)(1).

It seems to me that paragraph (g) provides for a discharge because at that stage of the proceedings consideration has only been given to the charge and no evidence has yet been recorded. When the court

holds a charge to be groundless it merely means that the charge is dismissed or quashed. In making the order to the accused it is sufficient to say "discharged" and nothing more and then set forth the reasons.

As to the effect of a discharge under the Criminal Procedure Code section 302(v) clearly provides that the dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purpose of the section, which bars the trial of a person who has been convicted or acquitted of the same offence.

For reasons which have been stated I find that the preceding president did not conduct the trial in the manner required by section 173 of the Criminal Procedure Code. The order of the preceding president is bad because it was not made in accordance with law and at a stage of a trial contrary to the requirements of law. In exercise of my revisionary powers I set it aside and direct that the trial before the succeeding president to proceed.

I shall leave it to the succeeding president whether to adopt the evidence that has been recorded by the preceding president or to recommence the trial, regard to be had to section 261 of the Criminal Procedure Code.

The application of the petitioner is therefore dismissed.

Application dismissed.

Solicitors: *David Marshall.*

KHO CHOON TEE v. SUPERINTENDENT OF LANDS & SURVEYS, THIRD DIVISION

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) April 8, 1972]

[Kuching — Federal Court Civil Appeal No. 53 of 1971]

Land Laws — Acquisition of land — Assessment of market value — Whether to be based on "residual method" or "comparative sales" — Payment of interest — Land Code (Sarawak Cap. 81), s. 69.

This was an appeal against the decision of the learned High Court judge who had assessed the market value of certain land at $23,000 an acre.

By virtue of the provisions of the Land Code, the Government of Sarawak acquired a certain piece of land, about 3.261 acres in area, for a development project. Notice of intention to acquire the said land was published in the *Gazette* on October 27, 1967, which formed the relevant date for assessing the market value of the land.

At an inquiry held on May 16, 1969, the appellant/owner claimed a sum of $450,000. The respondent awarded the appellant a sum of $71,220 as compensation. Two methods of valuation were used: (a) the residual method and (b) comparative sales. The respondent adopted the latter.

The appellant objected to the award and asked for reference to the High Court. At the hearing thereof, the appellant reduced his claim to $161,000. The learned judge assessed, *inter alia*, the market value of the said land at $75,003 *i.e.*, $23,000 an acre.

On appeal, the question before the court was what, on the evidence, was the market value of the land, market value being defined as ".... the price which an owner willing but not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the said land."

Held: (1) the learned judge's assessment could not be sustained as he had not indicated on what comparable or on what method he had formed his assessment and must be set aside;

(2) the assessment should be based on comparative sales. Thus, after considering all the evidence and the advantages and drawbacks of the said land, the market value was to be assessed at $32,000 an acre. Therefore, the award for 3.261 acres comprised in the said land was to be increased to $104,320;

(3) interest was to be paid by the respondent in accordance with section 69 of the Land Code.

Cases referred to:-

(1) *Kailas Chandra* v. *Secretary of State* 17 Cal. L.J. 35.

(2) *Nanyang Manufacturing Co.* v. *The Collector of Land Revenue, Johore* [1954] M.L.J. 69.

(3) *Khoo Peng Loong* v. *Superintendent of Lands and Surveys* [1966] 2 M.L.J. 156 at p. 158.

(4) *Aik Hoe & Co. Ltd.* v. *Superintendent of Lands and Surveys* [1968] 1 M.L.J. 293 at p. 295.

(5) *Collector of Land Revenue* v. *Alagappa Chettiar; Collector of Land Revenue* v. *Ong Thye Eng* [1971] 1 M.L.J. 43 at p. 44.

(6) *Improvement Trust Bombay* v. *K. Karsandas* 10 Bom. L.R. 688.

(7) *U.P. Government* v. *H.S. Gupta* A.I.R. 1957 S.C. 202.

FEDERAL COURT.

C. T. Wong for the appellant.

Mohamed Jemuri bin Serjan (Assistant State Attorney General) for the respondent.

Ismail Khan, C.J. (Borneo): The Government of Sarawak acquired under the Land Code all that piece of land comprising Lot 109 Block 37 Sarikei Land District in area about 3.261 acres (hereinafter called "the land") in connexion with the development of Sarikei Bazaar.

Notice of the intention to acquire the land was published in the *Gazette* on 27th October 1967. This was the relevant date for the purpose of assessing the market value of the land.

At an inquiry held on 16th May 1969, the owner of the land (hereinafter called "the appellant") claimed a sum of $450,000. The Superintendent of Lands and Surveys (hereinafter called "the superintendent") awarded the appellant a sum of $71,220 as compensation, made up as follows:-

The land 3.261 acres at $20,000 per acre	$65,220
One wooden house about 6 years old, cocount trees	5,200
Expenses in connexion with removal, etc.	800
	$71,220

The appellant objected to the superintendent's award and asked for reference to the High Court. At the hearing thereof the appellant reduced his claim from $450,000 to $161,000. The learned judge assessed the market value of the land at $75,003, that is, $23,000 an acre. He confirmed the award for the wooden house at $5,200 and the expenses for removal